(3)

No. 90-1036

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROGER ATKINSON; POLLY ATKINSON; and ROGER ATKINSON AND POLLY ATKINSON, as guardians ad litem for CHAD ATKINSON,

Petitioners,

v.

IHC HOSPITALS, INC. aka INTERMOUNTAIN HEALTH CARE, HOSPITALS, INC., a Utah corporation, SCOTT WETZEL SERVICES, INC., a corporation, SCOTT OLSEN; STEPHEN G. MORGAN; MORGAN, SCALLEY & READING; and JOHN DOES I THROUGH X,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

PETITIONERS' REPLY BRIEF

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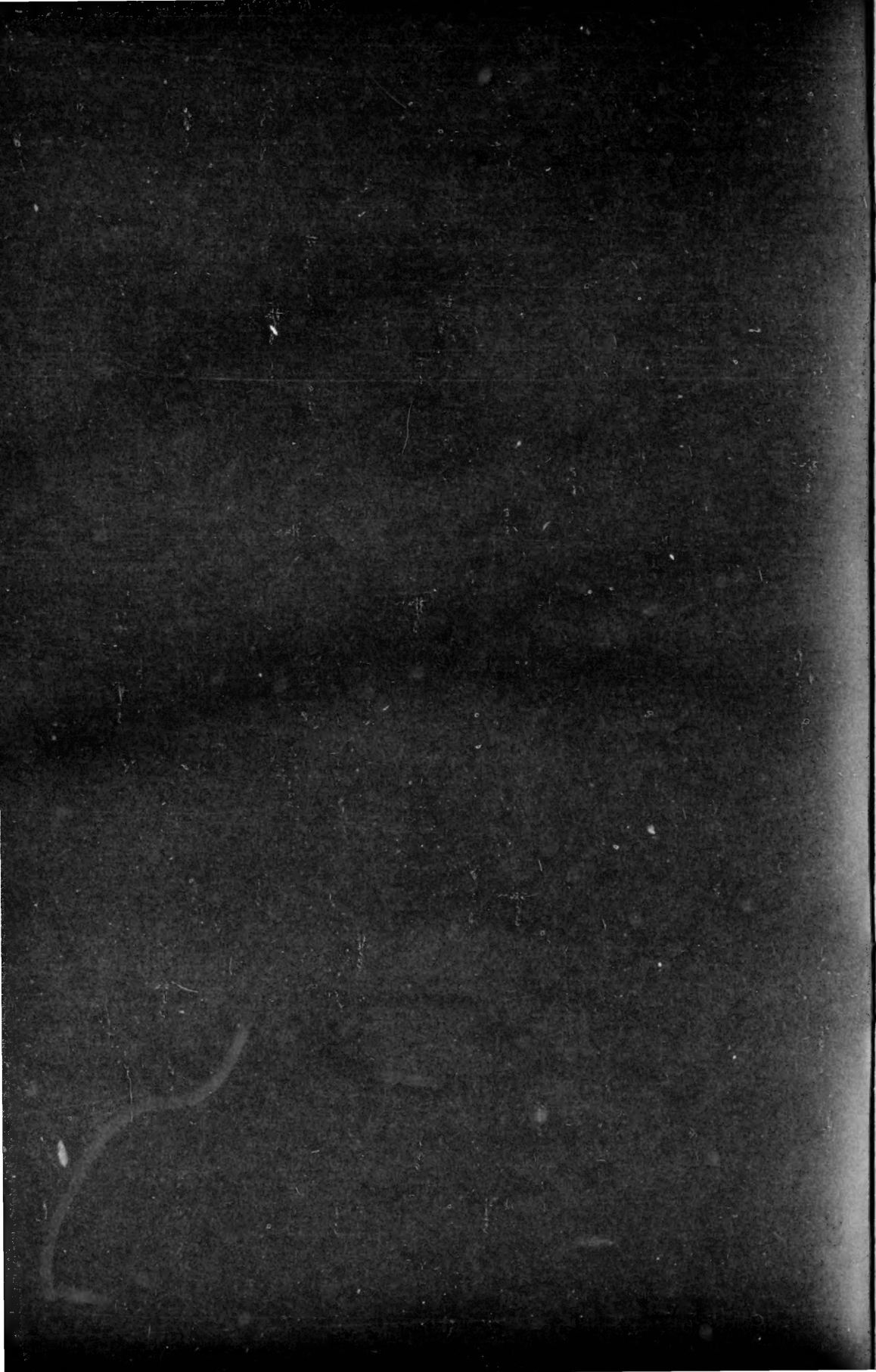

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

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ARGUMENT

POINT I

THE PARTIES' BRIEFS ESTABLISH THAT THIS CASE IS A CLASSIC FACTUAL DISPUTE. CERTIORARI SHOULD BE GRANTED TO INSURE THAT THE "FAIR-MINDED JURY" TEST IS NOT USED TO DEPRIVE PARTIES OF THEIR RIGHTS TO A JURY TRIAL.

In this case, the Atkinsons wanted to prove the following facts to a jury:

1. Morgan acted as the Atkinsons' attorney;
2. The Atkinsons relied upon Morgan, and not some outside attorney;
3. The Atkinsons relied on the probate court judge to insure that the settlement was fair;
4. The probate judge did not investigate or evaluate the merits of the underlying medical malpractice claim;
5. The Atkinsons were misled about the extent of the child's injury.

However, the Atkinsons did not get their chance to present evidence to a jury. Rather, the Utah Supreme Court, affirming summary judgment, made the following findings of fact:

1. "It is equally clear that they [Atkinsons] did not consider Morgan to be their attorney. . . ." (Compare paragraph 1 above and paragraph 1 below.) (Petitioners' Brief at A-5; 798 P.2d at 735.)
2. "The Atkinsons . . . apparently did discuss the settlement with an attorney of their own choosing." (Compare paragraph 2 above and paragraph 2 below.) (Petitioners' Brief at A-5; 798 P.2d at 735.)

3. "It is clear that the Atkinsons did not . . . rely upon . . . the probate judge to evaluate the fairness of the settlement." (Compare paragraph 3 above and paragraph 3 below.) (Petitioners' Brief at A-11; 798 P.2d at 737.)
4. "We conclude that the hearing was conducted in a jurisprudential manner. . . ." (Compare paragraph 4 above and paragraph 4 below.) (Petitioners' Brief at A-15; 798 P.2d at 738.)
5. "[T]he Atkinsons were fully informed that the extent of Chad's brain damage was not yet determinable or certain." (Compare paragraph 5 above and paragraph 5 below.) (Petitioners' Brief at A-14; 798 P.2d at 737.)

Respondents' brief has marshalled all of the facts which appear to support the decision of the Utah Supreme Court. *See generally*, Respondents' Brief in Opposition pp. 1-4, 9-10, 15-18. It is obvious that the Utah Supreme Court simply choose to believe Respondents' version of the facts. The problem is that there is a competing version of the facts. Indeed, there was *direct* evidence controverting each of the Utah Supreme Court's findings of fact.

The only possible way to reply to Respondents' factual arguments is to marshall specific facts which may lead a jury to an opposite conclusion. Thus:

1. Testimony tending to show that the Atkinsons considered Morgan to be their attorney is marshalled at Appendix, Exhibit 1.
2. Testimony tending to show that the Atkinsons did not rely on an outside attorney is marshalled at Appendix, Exhibit 2.
3. Testimony tending to show that the Atkinsons relied on the probate court to insure that the settlement was fair is marshalled at Appendix, Exhibit 3.

4. Testimony that the probate judge did not investigate or evaluate the merits of the underlying settlement is marshalled at Appendix, Exhibit 4.
5. Testimony that the Atkinsons were misled about the extent of the child's injuries is marshalled at Appendix, Exhibit 5.

In summary, the Utah Supreme Court simply believed one version of fact and rejected the alternate version of fact. Further, the Utah Supreme Court appeared to rely on the "fair-minded jury" test[1] as a justification for such a summary fact finding procedure. The question presented in the Petition for Certiorari is whether the Utah Supreme Court denied the parties the right to a jury trial.

POINT II

A CHILD'S RIGHT TO DUE PROCESS IN A PROBATE HEARING IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.

The right to due process applies to minors. *e.g.*, *Belloti v. Baird*, 443 U.S. 622 (1979). Respondents apparently concede as much, since they do not brief the issue. Rather, Respondents argue that the child was not denied due process because of the following factors: the parents had notice of the hearing; the parents were present; and the judge asked the parents if they thought the settlement was fair. (Respondents' Brief pp. 9, 10.)

The Respondents' analysis misdirects the focus to the parents rather than the child. It is not the parents' right to due process which the courts are concerned about. The

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1

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) discussed at pp. 14-18 of the Petition for Writ of Certiorari.

parents are merely officers of the court. *Dacanay v. Mendoza*, 573 F.2d 1075, 1079 (9th Cir. 1978). The child is the ward of the court and the person needing due process. The child, not the parents, is entitled to an independent court evaluation of the underlying claim. *Id.* The court should not merely rely upon the statements of the parents. *e.g.*, *Dearing v. Speedway Realty Co.*, 40 N.E. 2d 414, 418 (Ind. App. 1942). However, in this case, that is exactly what the probate court did:

> Q: [To the Probate Judge.] What did you rely on to conclude that it was in the best interest of the minor . . . to complete this settlement?
>
> A: Well, I believe that they told me -- Mr. and Mrs. Atkinson told me that they felt that it was reasonable. The fact that the amounts of money involved, the . . . child was going to get health care . . . for a substantial length of time.
>
> * * *
>
> A: [I]t's not for the judge, in my opinion, to substitute his or her judgment for the judgment of the litigants [parents].
>
> * * *
>
> The judge is never in a position to say substitute his judgment for the folks that are involved. . . .
>
> * * *
>
> Q: [Y]ou didn't evaluate the underlying claim against IHC, did you?
>
> A: No, I didn't.

(Deposition of Judge Phillip Fishler, March 30, 1988 pp. 37, 10, 51.)

Further, to allege that the hearing was conducted with due process is fiction. There was no notice. The hearing was not on the court calendar. The proceeding occurred during

a court recess outside of the courtroom. The judge cannot recall whether he read the settlement documents.

> A: [Of the Probate Judge.] I recall Mr. Morgan coming in to see me . . . [W]e had other meetings on the calendar . . . it was on a recess. . . .
>
> * * *
>
> Q: Do you recall whether the Chad Atkinson proceeding was on your probate calendar that day?
>
> A: It was not. . . He [Morgan] just came to me and said Judge. . . He came to me and we were on a recess from another matter. The clerk rang me and [sic] back in chambers she said Mr. Morgan is here to see you. I said send him back. He came back and said do you have time to do a court approved settlement of a minor's claim and I said, yes, I'll do that for you. . . .
>
> Q: [D]o you recall whether the proposed release and explanatory note were attached to the petition in the Chad Atkinson proceeding.
>
> A: I can't recall.

(Deposition of Judge Phillip Fishler, March 30, 1988, pp. 7, 8, 9, 15).

In summary, the proceeding was not the kind of hearing which one expects when due process is mentioned. Respondents argue that the probate court did enough for due process purposes. However, that is a factual argument which should be reserved for a brief on the merits. The legal issue is whether this Court should grant certiorari to determine whether due process requires a probate court to evaluate the underlying claim and conduct the hearing in a way that protects the disabled child. Certiorari should be granted to determine the extent of court protection which the due process clause affords to children.

POINT III

THE ISSUE OF A LITIGANT'S SEVENTH AMENDMENT RIGHT TO A JURY TRIAL IS AN IMPORTANT FEDERAL QUESTION.

1. This was not an "appropriate" case for granting of summary judgment.

Respondents argue that there is no constitutional problem about granting summary judgment in an *appropriate* case.[2] (Respondents' Brief p. 13.) However, that argument simply begs the question. The issue is whether it is a violation of due process (and a party's right to a jury trial) to grant summary judgment in an *inappropriate* case.

A related question is whether the "fair-minded jury" test set up in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) is a workable test in close cases. In other words, does the "fair-minded jury" test give courts a clear boundary between cases which can be disposed of by summary judgment, and cases which are entitled to a jury trial?

2. There is no question that the Utah Supreme Court applied the "fair-minded jury" test in this case.

Respondents contend that, "It is not apparent that the Utah Supreme Court even applied the 'fair-minded jury' test complained of by Petitioners." (Respondents' Brief p. 14.) However, abstracts of the oral argument transcript show that the Utah Supreme Court did apply the "fair-minded jury" test:

2

Respondents cite *King v. United Benefit Fire Insurance Co.*, 377 F.2d 728, 731 (10th Cir.), *cert. denied*, 389 U.S. 857, 88 S.Ct. 99 (1967) ("Granting of a motion for summary judgment in an *appropriate* case does not infringe upon the right to a trial by jury. . . .") (Emphasis added.)

> UTAH SUPREME COURT JUSTICE: [T]he question in my mind is . . . whether a reasonable jury could have found that he was their lawyer. . . .
>
> * * *
>
> UTAH SUPREME COURT JUSTICE: [O]bviously, the trial judge has decided no reasonable jury could have gone with you on that issue.
>
> * * *
>
> UTAH SUPREME COURT JUSTICE: [T]his goes back to this question of the reasonable jury.
>
> * * *
>
> UTAH SUPREME COURT JUSTICE: So how could a jury believe and rely on the statement "them" made by Mr. Morgan. . . . I mean, I'm trying to get at what a reasonable juror could decide.
>
> * * *
>
> UTAH SUPREME COURT JUSTICE: Could a reasonable jury conclude that if what the Atkinsons say is true . . . whether the jury could still go ahead and find supportedly [sic] that Mr. Morgan was their attorney or at least in a limited engagement or one of those other particularized circumstances Mr. DeBry talked about?

(Transcript of Proceedings, Oral Argument, Utah Supreme Court, April 11, 1990, pp. 11, 15, 16, 22.)

As shown on pages 7-9 of this brief, the Utah Supreme Court made numerous factual findings. The only possible way the Utah court could have made such factual findings was to weigh the conflicting evidence.

3. The issues in this case are important.

Respondents argue that the issues in this case are not "important." (Respondents' Brief in Opposition pp. 7-8.) However, the issues presented in this case are monumental. The right to a jury trial is central to our system of justice.

This case squarely focuses on the dividing line between a summary judgment and a jury trial.

The present boundary line seems to be the "fair-minded jury" test as set forth in *Anderson v. Liberty Lobby, Inc.*, *supra*. Hundreds of courts all over the United States hear thousands of summary judgment motions each day. The theoretical framework for all of those motions is always the "fair-minded jury" test.

However, if the "fair-minded jury" test doesn't work, that is certainly an "important" even overwhelming problem that will affect thousands of cases each year. The case at bar offers an excellent factual pattern for the Supreme Court to analyze this "important" problem.

POINT IV

THE FEDERAL QUESTION ISSUES SET FORTH IN THE PETITION FOR CERTIORARI WERE ADEQUATELY RAISED IN THE UTAH SUPREME COURT

A. The Constitutional Issue of the "Fair-Minded Jury" Test was Adequately Raised in State Court.

Respondents' brief does not dispute that the question of whether application of the "fair-minded jury" criteria denies litigants a jury trial was adequately raised in the Utah Supreme Court. Thus, this Court has jurisdiction to consider the Atkinsons' petition for certiorari.

B. The Constitutional Issue of the Due Process Rights of a Minor in a Probate Hearing was Adequately Raised in State Court.

Whether the question of a violation of a constitutional right was adequately presented to the state court is itself a federal question. *Lovell v. City of Griffin*, 303 U.S. 444 (1938). All that is required is that the record show either expressly or by implication that the federal issue was presented in the state court system. *Webb v. Webb*, 451 U.S. 493 (1981).

Respondents, in their Brief in Opposition, ask that this Court overlook the substance of the child's due process arguments and focus on whether the Atkinsons properly labeled the issue.

The substance of the Atkinsons' due process argument, throughout the litigation has always been the same. Specifically, children are entitled to have the court independently investigate the underlying claim. To do that, requires ". . .a *real* and not a perfunctory hearing. . . ." See Petition for Certiorari p. 10, fn.1.

C. The Constitutional Issue of the Seventh Amendment Right to a Jury Trial was Adequately Raised in State Court.

The Respondents neglected to mention that the Petition requests this Court to revisit the issue of whether the Seventh Amendment right to a jury trial applies to the states by way of the due process clause. *See*, pp. 22-23 of the petition. This issue, in and of itself, is a compelling reason to grant certiorari.

CONCLUSION

The federal claims were adequately raised in the Utah Supreme Court. The issues presented in the petition for certiorari are important federal questions that have not been, but should be, decided by the United States Supreme Court. For these reasons, certiorari should be granted.

Respectfully Submitted,

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EXHIBIT 1

ABSTRACT OF TESTIMONY TENDING TO SHOW THAT THE ATKINSONS CONSIDERED MORGAN TO BE THEIR ATTORNEY[1]

Q: [To Polly Atkinson[2]]
Tell me what was said by whom in this meeting with Mr. Morgan.

A: . . . He told us he was here to represent us.
. . .

(R 647, p. 84:5-12; Deposition of Polly Atkinson.)

Q: [To Polly Atkinson]
Now, when you went to Mr. Morgan I think you said you felt like he was representing you?

A: He told us he was representing us.

(R. 647, p. 117:20-22.)

Q: [To Polly Atkinson]
You thought he [Morgan] could fairly assess the two disputed sides of the claim?

A: . . .He [Morgan] told us that he was there to help us and represent us in this.

(R. 647, p. 118:18-22.)

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1 All of this testimony was presented to the trial court and the Utah Supreme Court.

2 Polly Atkinson is the mother of the injured child. At the time of the probate hearing to confirm the settlement, Polly was 16 years old.

Q: [To Roger Atkinson]
Tell me what was said and by whom in that meeting [the first meeting] with Mr. Morgan.

A: We were introduced to him as Steve Morgan. He said he was our lawyer to represent us.

(R. 644, pp. 93-94.)

Q: Do you deny you had information that he was counsel for Intermountain Health Care at the time this court hearing was held?

A: Yes sir. It was my belief he was a lawyer for us.

(R. 644. pp. 124-5.)

Q: [To Morgan]
Okay. What was said by the Atkinsons and yourself?

A: . . .I recall that I . . . did say . . . Now I've got those documents and I would like to go over them with you.

. . . And so after that initial conversation that I told you about we went into either my office or the conference room and I sat down and went over in detail each of the documents and read them and *explained* them to Atkinsons. (Emphasis added.)

* * *

A: And in the course of reading the document to the Atkinsons *I wanted them to understand* what guaranteed meant, *and that is why we added the language*, to clarify that guaranteed payment meant that if Chad

> should die they, the parents, would still receive the payments. (Emphasis added.)
>
> * * *
>
> I also explained to them these various figures and, for example, how $900,000 was arrived at. . . .
>
> * * *
>
> So I attempted to explain to them these payments and what guaranteed meant and how these figures were arrived at. And I did that.
>
> * * *
>
> And I also explained how the total payouts to Chad and his parents, should Chad live a normal lifetime, of $1,280,000 was arrived at.
>
> * * *
>
> I read that document to them and explained to them that *in order for the Court to approve and sign this order that the Court would have to find that the settlement in all respects was fair.* (Emphasis added.)

(R. 652, pp. 15-18, 21, 22, 25, 33.)

> THE COURT: This is P-83-692, in the Matter of Chad Atkinson, a minor.
>
> MR. MORGAN: Steve Morgan representing *them.* . . .(Emphasis added.)

(R. 189-195[3]; Transcript of Hearing, July 22, 1983 p. 1.)

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[3] This is an exerpt from the probate hearing during which the court confirmed the settlement with IHC.

EXHIBIT 2

ABSTRACT OF TESTIMONY TENDING TO SHOW THAT THE ATKINSONS DID NOT RELY ON AN OUTSIDE ATTORNEY[4]

Q: [To insurance adjuster]
What happened next?

A: I told them [Atkinsons] that they would have to have an attorney to finalize this with the Court.

Q: [To insurance adjuster]
What did they say? What did Roger or Polly say?

A: They asked if I knew of an attorney.

Q: [To insurance adjuster]
And then what did you say?

A: I said, "Yes, I do know of an attorney that you could use, but you're free to get whomever you want. But I know of one."

Q: [To insurance adjuster]
Then what happened?

A: . . . [T]hey asked who the attorney was that they didn't want to go to all the trouble of finding an attorney to do this, and *so they asked me to get the attorney*. (Emphasis added.)

---

[4] All of this testimony was presented to the trial court and the Utah Supreme Court.

Q: [To insurance adjuster]
And what did they say?

A: Specifically, I don't remember, but it was generally, "How can we get a hold of him," or such. And I said, "He or his office will contact you. I will talk to him and he and his office will contact you."

(R. 653; pp. 48:13-49:21.)

* * *

Q: [To insurance adjuster]
Why did you recommend Steve Morgan?

A: The second reason is because I have dealt with Steve in the past, and find him completely, one hundred percent honest, and *I knew that he would be concerned with the Atkinsons*. (Emphasis added.)

(R. 653, p. 50:6-13.)

* * *

Q: [to Polly Atkinson]
Tell me again your understanding of how you came to see Mr. Morgan.

A: . . . [T]hey told us they would get a lawyer and have him go over it [settlement documents] with us.

(R. 647 p. 83:13-18.)

* * *

Q: [To Polly Atkinson]
I'm trying to find out what went on at the hearing. I wasn't there. I need to know what this transcript means. Then he [the

Court] said: "Have you got the advice of legal counsel in this matter?" Then you said: "I've talked to someone about it but we're not planning on getting a lawyer." Have I read that right?

A: Yes.

Q: [To Polly Atkinson]
You didn't say you talked to Mr. Morgan to get advice, did you?

A: He was our lawyer.

Q: [To Polly Atkinson]
And he was there?

A: Yes.

Q: [To Polly Atkinson]
The Court didn't ask him any questions about it, is that true?

A: That's the only question the judge asked me about it, you know. I thought the judge knew he was my lawyer, I'm sorry.

Q: [To Polly Atkinson]
If the judge asked you that and you said you weren't planning on getting one, why did you say that?

A: Because they set us up with a lawyer. We already had a lawyer.

(R. 647, pp. 126:11-127:12.)

EXHIBIT 3

ABSTRACT OF TESTIMONY[5] TENDING TO SHOW THAT THE ATKINSONS RELIED ON THE PROBATE COURT TO INSURE THE FAIRNESS OF THE UNDERLYING SETTLEMENT[6]

Q: [To Morgan]
. . . [D]id you explain other documents to the Atkinsons. . . ?

A: [Morgan] . . . I read that document to them [Atkinsons] and explained to them that in order for the court to approve and sign this order *that the court would have to find that the settlement in all respects was fair.* (Emphasis added.)

(R. 652 pp. 31:7-8, 33:16-19.)

* * *

5

The Utah Supreme Court rejected this testimony. The Utah Supreme Court reasoned that the Atkinson's relied on their father (a union organizer) rather than on the judge. 798 P.2d at 737. However, there is evidence in the record that Roger's father assisted him in drafting a counter proposal. There is not one word in the record that Roger relied on his father's advice. Certainly there is not one word of evidence that Roger relied solely on his father. The opinion makes much of the fact that Roger's father helped draft a 10 page counter-offer. However, that counter-offer was rejected. (R. 651 p. 34.) A jury might infer that Roger did not rely on his father, because Roger went through with the deal even after his father's 10 page counter-offer was rejected.

6

All of this testimony was presented to the trial court and the Utah Supreme Court.

Q: [To Roger Atkinson]
Did you ask the judge if he thought it was okay?

A: No, I thought that's what a judge was for, to make sure you got fair -- whatever it's called-- settlement or so forth. I thought that's why you had to go to a judge.

Q: [To Roger Atkinson]
You figured if he didn't think it was okay, he'd tell you not to do it?

A: I figured that much, yes.

(R. 644, p. 120:16-24.)

EXHIBIT 4

TESTIMONY TENDING TO SHOW THAT THE PROBATE COURT DID NOT INVESTIGATE OR EVALUATE THE MERITS OF THE UNDERLYING SETTLEMENT[7]

Q: [to Judge Fishler]
In the Atkinson case you didn't evaluate the underlying claim against IHC did you?

A: No, I didn't.

(Deposition of Judge Phillip Fishler, March 30, 1988 p. 51:21-23.)

---

7 All of this testimony was presented to the trial court and the Utah Supreme Court.

EXHIBIT 5

TESTIMONY[8] TENDING TO SHOW THAT THE ATKINSONS WERE MISLED ABOUT THE EXTENT OF THE CHILD'S INJURIES[9]

Q: At the time you signed the settlement agreement in July of 1983, what was your understanding of Chad's condition?

A. He was a baby. It looked like he was progressing great. . . . He was doing fine. He was just a baby.

Q. Did anyone tell you your son would not be permanently brain damaged?

A. They gave it to me like he had a minor handicap if anything and the way they made it look, you know, that with a little therapy or so forth . . . that he would be fine.

(R. 644 pp. 109:7-12, 110:10-16.)

* * *

---

[8] The Utah Supreme Court rejected this testimony. The Utah Supreme Court reasoned that the Atkinsons should have read the various settlement documents. 798 P.2d at 737-38. The Utah Supreme Court seemed to based its conclusion on the written release form. However, the Utah Supreme Court failed to take into account that Roger Atkinson could barely read. (Roger Atkinson deposition pp. 62, 100, 126-127, 156-157.) At that time, Polly was only 16 years old.

[9] All of this testimony was presented to the trial court and the Utah Supreme Court.

A. He [Matlak] didn't tell me . . . what brain damage really means. I know it means "damage" but not what kind of damage.

Q. You understood that this brain damage was permanent?

A. No, I did not know. He didn't tell me it was permanent. They never mentioned anything like that.

(R. 647 p. 80.)

* * *

A: [Roger Atkinson]
He [Olsen, the insurance adjuster] said it looked like Chad was progressing pretty normally and was looking good . . . and that we'd be getting free money if anything because Chad should grow up fairly normal.

(R. 644, p. 75:5-8.)

Q: [To Polly Atkinson]
Tell me what Dr. Matlak told you about the seizure.

A: He just told us that they had given him phenobarbital to stop him from having another seizure and got him to the point where he was comfortable again, wasn't having any more. That was about it.

Q: Did Dr. Matlak tell you anything about the effect of that seizure. . . ?

A: No he didn't.

(R. 647, pp. 17-18.)

Q: Did you have any conversations about Chad's prognosis?

A: Well, he kept telling me how good he was doing and he was so happy he was doing so well.

(R. 647, p. 31:20-23.)

Q: You said Dr. Matlak talked about Chad, what did he say about Chad?

A: [H]e said that Chad should be find when we took him home. . . .

(R. 647, p. 33:17-22.)

A: [Dr. Thompson] said that Chad looked like he was doing really well. . . .

(R. 647, p. 38:20-21.)

A: . . . Dr. Thompson said at one time that he [Chad] was at an age fashionable level . . . where he was progressing like a normal baby. . . .

(R. 644, p. 30:2-5.)

A: They [the doctors] said he looked like he was doing fine.

Q: Who said that?

A: Dr. Matlak said he was ready to go home.

(R. 644, p. 28:16-18.)

A: [T]hey said he should grow up and be normal -- not be normal but be a healthy baby. This is what I gathered in conversations with them.

(R. 644, p. 29:3-6.)